Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JIMMY L. GRABACH and
DEAMA GRABACH,
Petitioners,

vs.

LARSSON FAMILY TRUST and
DOUGLAS LARSSON, TRUSTEE OF THE
LARSSON FAMILY TRUST,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Do state trial and appellate courts deny private landowners due process of law and facilitate the unlawful taking of private property in violation of the Fifth and Fourteenth Amendments by granting private civil litigants an easement over the landowners' property without compensation and in derogation of settled law.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioners, Jimmy L. Grabach and Deama Grabach, and the respondents, Larsson Family Trust and Douglas Larsson, Trustee of the Larsson Family Trust.

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PETITION FOR WRIT OF CERTIORARI

The petitioners, Jimmy L. Grabach and Deama Grabach, respectfully pray that a writ of certiorari issue to review the judgments, opinions and orders of the Supreme Court of the State of California, the Court of Appeal of the State of California and the Superior Court of the State of California entered in the above-entitled proceeding on December 15, 2004, August 25, 2004, and January 13, 2003, respectively.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California has been reported at 121 Cal.App.4th 1147. It is reprinted in Appendix A, *infra*. The Judgment of the Superior Court of the State of California has not been reported. It is reprinted in Appendix B, *infra*. The order of the California Supreme Court is not reported. It is reprinted in Appendix C, *infra*.

JURISDICTION

Respondents obtained a judgment against Petitioners in the Superior Court of the State of California on January 13, 2003. On Petitioners' appeal, the California Court of Appeal affirmed the Superior Court's judgment on August 25, 2004. The California Supreme Court denied review on December 15, 2004.

The jurisdiction of this Court to review the judgment of the California Supreme Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1257(a). Final decisions of state courts.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall ... be deprived of life, liberty, or property without due process of law;...."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. PRELIMINARY INFORMATION

This case presents a question of increasing importance in California and the rest of the nation as pastoral country acreages are increasingly being sold, divided and developed for vacation homes and other recreational uses. The indispensable ingredient for land use is access, and the law of easements (express and implied) is consequently gaining more prominence in modern land acquisitions and development. And because the financial and aesthetic stakes at play today in rural development are far higher than ever before, easement disputes are on the rise and access issues are becoming a more heavily litigated topic.

Historically, California's courts have always safeguarded the plenary rights of adjoining landowners by refusing to recognize or "imply" easements over the lands of neighbors except in certain narrowly prescribed circumstances.

> "An easement will be implied [only] when, at the time of conveyance of the property, the following conditions exist: 1) the owner of the property conveys or transfers a portion of that property to another; 2) the owner's prior existing use of the property was of a nature that the parties must have intended or believed that the use would continue; meaning that the existing use must either have been known to the grantor and the grantee, or have been so obviously and apparently permanent that the parties should have known of the use; and 3) the easement is reasonably necessary to the use and benefit of the quasi-dominant tenement."

(*Tusher vs. Gabrielsen* (1998) 68 Cal.App.4th 131, 141.) The cases usually address conveyances by living grantors. Nevertheless, in every case, the actual or presumed intent of the grantor has been given paramount consideration. (See *Cheda vs. Bodkin* (1916) 173 Cal. 7; *Roemer vs. Pappas* (1988) 203 Cal.App.3d 201.) California Civil Code section 1104 codifies California common law on the subject (*Tusher vs. Gabrielsen, supra*, 68 Cal.App.4th at p. 141, fn.12) as follows:

> "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed."

California decisions have not heretofore addressed the question whether an easement may be created or "implied" in the context of intestate probate proceedings which divide and distribute a decedent's land to multiple heirs pursuant to the heirs' post-death partition agreement. If there is no testamentary instrument in existence, and if there is no evidence of the decedent's use of his property at or near the time of his death, the "grantor's" intent cannot be known and the *Tusher* requirements cannot be met.

Yet, in the present case, the California Court of Appeal determined that California Civil Code section 1104 permitted the creation of an implied easement in an intestate probate proceeding where there was no evidence of the decedent's intent or of his use of his land during the last 20 years of his

life. It did so because it found there was substantial evidence in the record that an easement across the land of one heir was "reasonably necessary" to enable another heir, who already had access to one highway, to reach a second highway in another direction.

The Court of Appeal's published decision purports to rely upon California Civil Code section 1104 and out of state decisions to achieve its result. But the foreign authorities are plainly distinguishable, and the Court of Appeal's use of Civil Code section 1104 ignores the plain language of the statute and the common law precepts upon which it is based. Indeed, by stressing what section 1104 does not require (e.g., "section 1104 does not contain any absolute requirement that there be a living grantor" [Appendix A, p. 11]), the Court of Appeal also suggests that section 1104 is an impediment that can be overcome and that the statute's requirements may be suspended (at least in part) when land is broken up and distributed to multiple heirs through intestacy. That is not good law because it denies Petitioners (and will deny to others similarly situated) fundamental due process, i.e., it permits an unlawful taking of real property. The questions this case presents are likely to recur as the pace of development quickens in California and elsewhere in the United States.

B. BACKGROUND AND THE PROCEEDINGS BELOW

Nelson Logan died intestate in 1942 owning a tract of land in Madera County. He had four heirs at law. Pursuant to the heirs' post-death agreement, the probate court divided Mr. Logan's land into discrete parcels and distributed those parcels to individual heirs rather than transfer the larger, undivided property to the heirs as tenants in common. The probate decree said nothing about use of a dirt road which

meandered through each of the parcels and which connected with paved highways at each end.

The Larsson Family Trust is the successor of one of the original heirs of Mr. Logan's estate, and it owns one of the parcels that had been partitioned off in the 1942 probate proceedings. The Larsson parcel has always had access along the dirt road to a paved highway to the east. The Grabachs are the successor owners of the partitioned parcel to the west of the Larsson parcel. When the Grabachs declined to allow the Larssons to traverse the dirt road across the Grabachs' land to reach a paved highway to the west, the Larssons sued and won. The trial court determined the Larssons had both an easement by strict necessity and an implied easement (i.e., an easement of "reasonable necessity") across the Grabach land.

The California Court of Appeal found there was no strict necessity because the Larssons had access to their land by way of the paved highway to the east. The Court of Appeal consequently reversed that part of the judgment. However, in the published portion of its opinion, it agreed with the trial court that there was substantial evidence of the existence of an implied easement. It concluded that,

> "unless the heirs of Nelson Logan, and the probate court, intended for the [Larssons' predecessor] to have a parcel with no access to a [second] public road, they must have intended for [the predecessor] to use the unpaved road to reach her property from [the second road] and across the parcel we are calling the Grabach property." (App. A, p. 10)

The California Supreme Court denied the Grabach's Petition for Review without comment.

REASON FOR GRANTING THE WRIT

REVIEW SHOULD BE GRANTED BECAUSE THE OPINIONS BELOW CONFLICT WITH THIS COURT'S PRIOR RULINGS ON THE ESSENTIAL DUE PROCESS RIGHTS OF LITIGANTS TO HAVE DISPUTES RESOLVED ON THE BASIS OF RECORD FACTS AND ESTABLISHED LAW AND TO NOT ARBITRARILY SUFFER THE LOSS OF VALUABLE PROPERTY RIGHTS.

This Court has held that the federal constitution guarantees to private citizens involved in state court litigation the right to judicial determinations that are consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. (See *Poulos vs. New Hampshire* (1953) 345 U.S. 395.) In particular, due process requirements bar state courts from arbitrary decision-making, especially decision-making that is not rooted in the facts of the particular case. (See *Manley vs. Georgia* (1929) 279 U.S. 1.) This court has also declared that federal due process requires state courts to adhere to established law and precedent, and prohibits state involvement in the taking of private property without compensation and without first observing stringent due process safeguards. (See *Fuentes vs. Shevin* (1972) 407 U.S. 67.) As Petitioners will demonstrate, the state courts in this case have acted in derogation of Petitioners' foregoing rights by granting to Respondents an easement over Petitioners' private residential property and by subsequently affirming the existence and legality of that easement.

The California Court of Appeal determined that the 1942 probate court properly gave effect to a request by the decedent's legal heirs to distribute the decedent's real property, not pursuant to California's long-standing laws of intestate succession (the decedent died without a will), but pursuant to the heirs' private distribution agreement. (Appendix A, pp.11-12.) The probate court's decree gave each of the heirs a discrete fee interest in a portion of the decedent's land, a result that was plainly inconsistent with the decedent's presumed intent, i.e., that his property pass undivided to his heirs at law as tenants in common. The distinction is significant; had the property passed pursuant to California's intestacy scheme, there would have been no easement in 1942, express or implied, or any need for one.

Equally significant is the fact that the 1942 decree created no express easement over any of the discrete parcels, even though the heirs' agreement (and the court's 1942 decree) surely would have provided for one if the heirs (or the court) had perceived a need for an easement and had intended that there be one or more easements over one or more of the newly-created parcels. Furthermore, no party to the present proceedings introduced any evidence at trial that bore upon heir (or judicial) intent in 1942. The only evidence of early events concerned neighbors' recollections of unrelated matters, e.g., the decedent's use of the easement area 20 or more years before his death. However, there was evidence at trial that in 1942, as now, Respondents' predecessors already had access to their parcel from the east and that access from what is now Petitioners' parcel was not reasonably necessary for the use and enjoyment of Respondents' land. There was consequently no factual basis for the courts in this case to "recognize" the existence of an implied easement across Petitioners' property for the benefit of Respondents' property. In sum, although the 1942 court failed to give effect

to the decedent's presumed intent, the court nevertheless did not intend, and it's decree did not create, any express or implied easement over any portion of the decedent's property.

The California Court of Appeal acknowledged that, under California law, an easement will be implied only if all of the following conditions exist: (1) the owner of the property conveys or transfers a portion of that property to another; (2) the owner's prior existing use of the property was of a nature that the parties must have intended or believed that the use would continue; meaning that the existing use must either have been known to the grantor and the grantee, or have been so obviously and apparently permanent that the parties should have known of the use; (3) the easement is reasonably necessary to the use and benefit of the quasi-dominant tenement. (Appendix A, p. 8, citing *Tusher vs. Gabrielsen* (1998) 68 Cal.App. 4th 131,141.) Yet there is no factual basis in the record of this case for concluding that any of those three conditions were met. As the Court of Appeal's opinion makes clear, it was the probate court, not the owner of the property, that transferred the property to the decedent's heirs. Furthermore, the owner's prior use of the property was not known. At best, the Court of Appeal could only surmise that the home of the prior owner (the decedent, Nathaniel Logan) was "near" a particular road and "apparently" on property now owned by Petitioners. (Appendix A, p. 10.) Respondents' primary witness, Lewis Shannon, could only testify concerning use of the unpaved road "back in the 20's"; he offered no testimony concerning decedent's use of the road at times relevant to this case, i.e., at or near the time of his death in 1942. Finally, an implied easement was not reasonably necessary in 1942 (and is not necessary now) because, as the Court of Appeal noted in its discussion of easements by necessity (Appendix A, pp. 5-8), Respondents' parcel had (and continues to have) easy access to a public road without

the necessity of an easement over Petitioners' property. The acts of the courts in this case, decreeing an implied easement under these circumstances, with no factual basis for doing so, and contrary to settled California law, were arbitrary and capricious and denied Petitioners their constitutional rights to due process of law and a fair hearing on the issue. The result is that Respondents now possess, solely for their convenience, an implied easement across Petitioners' mountain home property that seriously burdens Petitioners' enjoyment of their home and their land.

The law is clear that interests in real property constitute valuable property rights that are protected by the 14th Amendment. (See *Board of Regents vs. Roth* (1972) 408 U.S. 564; *Buchanan vs. Warley* (1917) 245 U.S. 60.) Among the other protections it affords, the 14th Amendment protects against any arbitrary deprivation of an individual's right to hold and enjoy property to the fullest extent. (See *Sterling vs. Constantin* (1932) 287 U.S. 378.) The Amendment protects against all unlawful action, whether it be accomplished by individual act, legislative enactment or judicial decree. (*Cooper vs. Aaron* (1958) 358 U.S. 1; *Southern R. Co. vs. Virginia* (1933) 290 U.S. 190; *Scott vs. McNeal* (1894) 154 U.S. 34. See also *Bonelli Cattle Co. vs. Arizona* (1973) 414 U.S. 313 (*ovr'ld on other grounds in Oregon ex rel. State Land Board vs. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363) [due process clause forbids confiscatory taking accomplished by judicial decree].)

In this case, the California courts failed to adhere to existing and well settled statutory and decisional law regulating the distribution of real property on intestate death and the creation of implied easements. Without factual support in the record, the California courts relied upon supposition and speculation and ignored legal precedent in

transferring a significant portion of Petitioners' property to Respondents, at no cost to Respondents, but at great financial and emotional expense to Petitioners. Petitioners' property has suffered a tremendous reduction in market value as a consequence, and Petitioners no longer enjoy the peace and quiet they once had. The 14th Amendment should protect against these abuses, and Petitioners respectfully request this Court's intervention on that basis.

CONCLUSION

For these various reasons, this petition for writ of certiorari should be granted. If Petitioners are correct in urging that they were denied due process of law in the proceedings that culminated in the judicial creation of an implied easement across their private property, the matter should be remanded to the California Court of Appeal for appropriate disposition.

DATED: March 11, 2005.

Respectfully submitted,

DAVID AUEN LINN
Counsel of Record

LINN & BLATE

Counsel for Petitioners
JIMMY L. GRABACH and
DEAMA GRABACH

APPENDIX A

CERTIFIED FOR PARTIAL PUBLICATION*

Court of Appeal
Fifth Appellate District
FILED
AUG 25 2004
Kay Frauenholtz
Clerk/Administrator
By _____
Deputy

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

LARSSON FAMILY TRUST et al.,
Plaintiffs and Respondents,
v.
JIMMY L. GRABACH et al.,
Defendants and Appellants.

F042675
(Super. Ct. No. CV04248)
OPINION

APPEAL from a judgment of the Superior Court of Madera County. Charles A. Weiland, Judge

Linn & Blate, and David A. Linn for Defendants and Appellants.

Law Office of Russell D. Cook, and Russell D. Cook for Plaintiffs and Respondents

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I and III.

The Larsson Family Trust (LFT) owns a 160-acre parcel of property (sometimes referred to herein as the Larsson property) in Madera County. LFT brought this quiet title action seeking a court determination that LFT held an easement (an unpaved road) across a neighboring 122-acre parcel owned by appellants Jimmy and Deama Grabach. The unpaved road across the Grabach property connects the Larsson property to a paved public road known as Road 400. The trial court found that LFT held an easement by necessity and an easement by implication in the unpaved road across the Grabach property.

The Grabachs have appealed. The contend that: (1) there was insufficient evidence to support the trial court's finding of the existence of an easement by necessity, (2) there was insufficient evidence to support the trial court's finding of the existence of an easement by implication, and (3) the trial court erred in denying their motion for a new trial. As we shall explain, we agree with the Grabachs' first contention only. The evidence was, however, sufficient to support the trial court's finding of an easement by implication. We will therefore affirm the judgment only insofar as it finds the existence of an easement by implication, reverse the judgment only insofar as it finds the existence of an easement by necessity, and remand the matter to the trial court for that court to modify its judgment in accordance with the views expressed herein.

We publish the portions of our opinion pertaining to the sufficiency of the evidence to support the trial court' finding of the creation of an easement by implication. We do so because this case presents a set of facts significantly different from those presented in other published California cases involving the creation of an easement by implication under Civil Code section 1104. Specifically, we hold that an

easement by implication can be created when an owner of real property dies intestate and the property is then divided and distributed to the intestate's heirs by court decree. As we shall explain, our holding is consistent with decisions of other jurisdictions, which have held that an easement by implication can be created when real property is transferred by court decree.

FACTS

Appellants Jimmy and Deama Grabach purchased their 122-acre parcel of real property in Madera County in 1998. The western edge of the Grabach property borders on a paved public road known as Road 400. The Larsson property is located directly south of the eastern portion of the Grabach property. The unpaved road in question begins at the western edge of the Grabach property, where it intersects with the paved public road (Road 400). A gate separates Road 400 from the unpaved road. After the Grabachs purchased their parcel in 1998, Jimmy Grabach locked the gate, thereby preventing the members of the Larsson family from gaining access to the unpaved road. The unpaved road heads in a generally southeast direction across the Grabach property to the northern border of the Larsson property. There was another gate where the unpaved road crosses the southern boundary of the Grabach property and enters the northern portion of the Larsson property. Jimmy Grabach changed the lock on that gate as well.

The unpaved road continues in an east/southeast direction across the Larsson property. To the east of the Larsson property is a parcel known as the "Twid/Lucas" property. From the eastern border of the Larsson property, the unpaved road continues in an easterly direction across the Twid/Lucas property. At the eastern edge of the Twid/Lucas property, the

unpaved road connects to a paved road which runs through a residential development known as Yosemite Lakes Park. To the east of Yosemite Lakes Park is another public road known as Highway 41. LFT did not contend that it held any easement in the portion of the unpaved road which extends eastward from the eastern boundary of the Larsson property and across the Twid/Lucas property.

Nelson Nathaniel Logan (also known as Nathaniel Logan) was a relative of the Larssons. At one time he owned all three of the parcels we have referred to above (i.e., the 122 acre Grabach property, the 160 acre Larsson property, and the Twid/Lucas property). When Nelson Logan died intestate, his property was distributed by probate court decree in December 1942 to his heirs. The parcel we have been calling the Larsson property went to Amanda Casaurang. Casaurang was an aunt of Doug Larsson, one of the current beneficiaries of the LFT. Doug Larsson's father, Albert Larsson, acquired the property in the early 1970's. Albert Larsson and his wife Bertha Larsson created the Larsson Family Trust and placed the property in trust in November 1995 for the benefit of their three sons, Gary, Douglas, and Dennis Larsson.

The parcel we have been calling the Grabach property passed from Nelson Nathaniel Logan to John Franklin Logan. After various intermediate conveyances (sometimes called "mesne conveyances") not pertinent to this appeal, the Grabachs purchased the parcel. The escrow on the sale to the Grabachs closed on October 7, 1998. Prior to their purchase of the property, the Grabachs were aware of the existence of the unpaved road across the property. Jimmy Grabach visited the property and saw the unpaved road. He also saw the two gates, and the sign saying "Larsson" near the gate at the boundary between the two properties. Jimmy Grabach testified that it was apparent to him that vehicular traffic used

the road. He also testified that he received an August 25, 1998 (i.e., pre-closing) fax from a realtor (Sherry Reames) informing him about a conversation another realtor (Brad Ditton) had with one of the Larsson brothers. The fax stated in part, under the heading "Larson [*sic*] Property . . .; Mr. Larson [*sic*] seemed very low key about the access commenting that he went that way because that was the way they had gone when his Grandfather owned the land."

We will present additional facts pertinent to this appeal in the course of our analyses below of the issues to which those additional facts pertain.

I.*

THE TRIAL COURT'S FINDING OF THE EXISTENCE OF AN EASEMENT BY NECESSITY IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

"The definition of substantial evidence review in the appellate courts is very well settled . . . [Citations.] . . . 'In reviewing the evidence on . . . appeal all conflicts must be resolved in favor of the [prevailing party], and all legitimate and reasonable inferences indulged in to uphold the [finding] if possible. It is an elementary, but often overlooked principle of law, that when a [finding] is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the [finding]. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

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* See footnotes, *ante*, page 1.

[Citation.]" (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571; see also *Crawford v. Southern Pac. Co.* (1935) 3 Cal.2d 427, 429.) Substantial evidence has been defined as evidence of "ponderable legal significance . . . reasonable in nature, credible, and of solid value." (*Ofsevit v. Trustees of Cal. State University & Colleges* (1978) 21 Cal.3d 763, 773, fn. 9.)

There was no substantial evidence of the existence of an easement by necessity because there was no substantial evidence of any necessity for an easement across the Grabach property. "The right of way from necessity must be in fact what the term naturally imports, and cannot exist except in cases of strict necessity. It will not exist where a man can get to his property through his own land. That the way over his own land is too steep or too narrow, or that other and like difficulties exist, does not alter the case, and it is only where there is no way through his own land that a grantee can claim a right over that of his grantor. It must also appear that the grantee has no other way." (*Kripp v. Curtis* (1886) 71 Cal. 62, 65.) "To establish a right to a way of necessity, strict necessity must exist; that is, when the claimed way constitutes the only access to the claimant's property." (*Roemer v. Pappas* (1988) 203 Cal.App.3d 201, 206.) "In California a right-of-way from necessity cannot exist in the absence of strict necessity." (*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 130, fn. omitted.) "A way of necessity arises from necessity alone and continues only while the necessity exists." (*Cassin v. Cole* (1908) 153 Cal. 677, 679.) Easements by necessity are based upon the "sound public policy that lands should not be rendered unfit for occupancy or successful cultivation. . . ." (*Reese v. Borghi* (1963) 216 Cal.App.2d 324, 331.) Thus the right by necessity . . . is limited in duration to the continuance of the necessity." (*Martinelli v. Luis* (1931) 213 Cal. 183, 184; see also 6 Miller & Starr, Cal.

Real Estate (3d ed. 2000), §§ 15.28, 15.84, and 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, §§ 459, 460.)

Lindy Cumberland, who was also referred to by some witnesses as Lindy Lucas and is one of the owners of the Twid/Lucas property, testified that she had given the Larssons permission to drive across the eastern portion of the unpaved road, i.e., the portion connecting Yosemite Lakes Park to the Larsson property and crossing the Twid/Lucas property. She testified that "[a]s long as I'm there they can sure come through." She also testified that she herself had driven that portion of the unpaved road crossing her property, and that the drive from the Yosemite Lakes Park road to the Larsson cabin on the Larsson property takes about 10 minutes. She also testified that the Larssons have in fact used the portion of the unpaved road crossing her property, and that Gary Larsson had even helped her maintain it. The road is a single-lane road suitable for travel by a car. Gary Larsson also testified that he helped to maintain the portion of the unpaved road crossing the Twid/Lucas property, and that after Grabach denied access across the Grabach property, Gary Larsson began using the portion of the unpaved road that crosses the Twid/Lucas property. Doug Larsson testified that since the Grabachs denied the Larssons access across the Grabach property, he has gained access to the Larsson property by crossing the Twid/Lucas property. Dennis Larsson also gained access to the Larsson cabin by crossing the Twid/Lucas property after the Grabachs denied permission to cross the Grabach property.

The Larssons cite *Kripp,* and argue that "the alleged Lucas/Twid alternate means of access is not relevant to a determination of" the issue of whether there is an easement by necessity across the Grabach property to reach the Larsson

property. The Larssons simply ignore the language in Kripp stating "(i)t must also appear that the grantee has no other way." (*Kripp v. Curtis, supra*, 71 Cal. at p. 65.) The Larssons do have another way. It is by permission across the Twid/Lucas property.

II.

THE TRIAL COURT'S FINDING OF THE EXISTENCE OF AN EASEMENT BY IMPLICATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE

"An easement will be implied when, at the time of conveyance of the property, the following conditions exist: 1) the owner of the property conveys or transfers a portion of that property to another; 2) the owner's prior existing use of the property was of a nature that the parties must have intended or believed that the use would continue; meaning that the existing use must either have been known to the grantor and the grantee, or have been so obviously and apparently permanent that the parties should have known of the use; and 3) the easement is reasonably necessary to the use and benefit of the quasi-dominant tenement." (*Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 141.)[1] The strict necessity

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[1] An easement is "a charge or burden on one estate, the servient, for the benefit of another, the dominant." (25 Am.Jr.2d, Easements and Licenses, § 1. fn. omitted.) "Although a person cannot have an easement on his or her own property, an owner may use one portion of land for the use and benefit of another portion. . . . In such cases . . . . the portion of the parcel that is being used is called the 'quasi-servient tenement,' and the portion or parcel benefited by the use is called the 'quasi-dominant tenement.'" (Miller & Starr, Cal. Real Estate (3d ed. 2000), Easements, §15:20.) Thus the unpaved road across the Grabach property is the servient tenement. The Larsson property is the dominant tenement.

required for an easement by necessity is not required for an easement by implication. The test is whether the easement is reasonably necessary for the beneficial enjoyment of the property conveyed. *(Owsley v. Hamner* (1951) 36 Cal.2d 710, 718-719.) An implied easement is "based on the theory that whenever someone conveys property, he includes or intends to include in the conveyance whatever is necessary for its beneficial use and enjoyment and to retain whatever is necessary for the use and enjoyment of the land retained." (25 Am.Jur.2d (1996) Easements and Licenses, § 23, fns. omitted.) The elements of an easement by implication "have been codified in Civil Code section 1104." (*Tusher v. Gabrielsen, supra*, at p. 141, fn. 12.) Civil Code section 1104 states: "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed."

After Nelson Nathaniel Logan died intestate, his land was distributed to his heirs in the court decree of December 1942. The parcel we have been calling the Larsson property went to Amanda Casaurang.[1] The parcels we have been calling the Grabach property and the Twid/Lucas property went to other heirs. The December 1942 court decree states that the four heirs (John Franklin Logan, Albertina Julien, Harrison A. Larsson, and Amanda Casaurang) "for the purpose of effecting a partition of their interests in this matter have all

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[1] Back when Nelson Nathaniel Logan was living and owned both parcels, the portion of the unpaved road in issue in this case was the quasi-servient tenement whenever he used it to travel to the portion of his property (the quasi-dominant tenement) that is now the Larsson property.

executed and caused to be delivered to each other a certain instrument in writing under the provisions of which they have divide the estate property among themselves . . . ." The decree further states that the court was distributing the estate of the decedent "pursuant to" that written agreement of the heirs. The entire unpaved road crossing what we have been calling the Grabach, Larsson and Twid/Lucas properties existed at the time of the December 1942 distribution. This was established through the testimony of Lewis W. "Bud" Shannon, who was born in 1918 and was raised near Road 400 "about a mile above" the Larsson property. Shannon testified that Nelson Nathaniel Logan was a "[g]ood friend of ours." He testified that the unpaved road in question, which runs generally east/southeast, "was the only access they had back in the 20's" to Road 400 from homesteads that were located in the area now known as Yosemite Lakes. It is thus apparent that unless the heirs of Nelson Nathaniel Logan, and the probate court, intended for Amanda Casaurang to have a parcel (the 160-acre Larsson property) with no access to a public road (Road 400), they must have intended for her to use the unpaved road to reach her property from Road 400, and across the parcel we are calling the Grabach property.

The fact that there may not yet have been a cabin on the Larsson property in 1942 does not matter. Shannon testified that Nelson Nathaniel Logan's cabin was near Road 400. Thus that particular cabin was apparently located on the property now owned by the Grabachs. He did not have to have another cabin on what is now the Larsson property in order for Amanda Casaurang to have an easement across what is now the Grabach property to reach the cabin she built in approximately 1943 on what is now the Larsson property. "'The extent of an easement created by implication is to be inferred from the circumstances which exist at the time of the conveyance and give rise to the implication. Among these

circumstances is the use which is being made of the dominant tenement at that time. Yet it does not follow that the use authorized is to be limited to such use as was required by the dominant tenement at that time. It is to be measured rather by such uses as the parties might reasonably have expected from the future uses of the dominant tenement. What the parties might reasonably have expected is to be ascertained from the circumstances existing at the time of the conveyance. It is to be assumed that they anticipated such uses as might reasonably be required by a normal development of the dominant tenement.'" (*Fristoe v. Drapeau* (1950) 35 Cal.2d 5, 9 (in turn quoting from Restatement, Property, § 484, comment b).) If Nathaniel Logan's cabin was not located on the parcel Amanda Casaurang received in the intestate distribution of Logan's property, the heirs and the probate court could reasonably have expected that she might build one, and that she would use the unpaved road from Road 400 to reach her cabin and her property.

Appellants Grabach appear to argue that there is no substantial evidence to support the creation of an easement by implication because there is no evidence that Nelson Nathaniel Logan intended to create any easement. But Nelson Nathaniel Logan never actually conveyed any property to his heirs. He simply died, and the laws of intestacy determined who would inherit his property. Civil Code section 1104 does not contain any absolute requirement that there be a living grantor. Nor does it contain any express requirement that the intent of a real property owner whose property transfers ownership upon his or her death must have been expressed in a duly executed will, even though a transfer by will can create an easement by implication. (*Cheda v. Bodkin* (1916) 173 Cal. 7.) The statute simply requires a "transfer of real property." (Civ. Code, § 1104.) Appellants Grabach argue that "there are no cases in California, on point, involving creation of an implied

easement in an intestate probate." But there are cases in other jurisdictions. "A right of way, upon a severance of the estate by partition between heirs, sometimes arises when it would not exist in case of a conveyance of one portion of the premises; and it may be laid down as a general rule that a partition of real estate among heirs carries with it, by implication, the same right of way from one part to and over the other as had been plainly and obviously enjoyed by the common ancestor, in so far as it is reasonably necessary for the enjoyment of each part." (*Ellis v. Basset* (1891) 128 Ind. 118, 27 N.E. 344, 345; in accord, see also *Jones v. Bethel* (1925) 20 Ohio App. 442, 152 N.E. 734, 735.) And the authors in Bruce & Ely, The Law of Easements and Licenses in Land, state at section 4:21, footnotes omitted: "Severance may be involuntary, as when land is divided by mortgage foreclosure, tax sale, or judicial partition. It has been argued that involuntary severance cannot form the basis of an implied easement because such servitude is predicated on the intent of the parties and the involuntary grantor has no intent to convey, much less an intent to create an easement as part of the conveyance. This argument is unpersuasive. Implied easements are not based on the grantor's actual subjective intent, but rather on the parties' presumed objective intent as determined from the surrounding circumstances." See also *Deisenroth v. Dodge* (1956) 7 Ill.2d 340, 346; 131 N.E.2d 17, 21, where the court stated: "This doctrine of implied easements is not limited to cases of direct conveyance by deed of the common owner, but applies to severance of unity of title by judicial proceedings of any character, including judgment in partition proceedings, if all other essentials are present." (In accord, see also 25 Am.Jur.2d Easements and Licenses, § 30.)

III.*

OTHER ISSUES

The Grabachs further contend that the court erred in denying their motion for a new trial. The motion contended that they should have been granted a new trial because the evidence was insufficient to justify the decision (Code Civ. Proc., § 657, subd. (6)), because the decision was the result of an error in law (*id.*, subd. (7) and because of an "(i)rregularity in the proceedings of the court . . . by which either party was prevented from having a fair trail." (*Id.*, subd. (1).) The first two of these three arguments are essentially a rehashing of appellants' argument that the trial court's decision is not supported by substantial evidence. we have addressed that argument in sections I and II above. The purported irregularity in the proceedings was that LFT's counsel submitted a document to the court while the parties were wrangling over the wording of the trial court's statement of decision after the trial had concluded. In denying the Grabachs motion for a new trial, the court stated that the document, a county ordinance, "had no significant bearing on my thought process" and that "the submission of whatever it was that Mr. Cook submitted is not in my mind a reason to grant a new trial because it's of no significance to the ultimate decision." The submission of the document thus was not an action "materially affecting the substantial rights of" appellants or an action by which appellants were "prevented from having a fair trial." (Code Civ. Proc., §§ 657, 657, subd. (1).)

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* See footnotes, *ante*, page 1.

DISPOSITION

The judgment insofar as it finds the existence of an easement by necessity is reversed for reasons stated. The judgment insofar as it finds the existence of an easement by implication is affirmed. The superior court is directed to modify its judgment in accordance with the views expressed in this opinion. Costs to respondent.

/s/ Ardaiz,
Ardiaz, P.J.

WE CONCUR:

/s/ Harris
Harris, J.

/s/ Levy
Levy, J.

APPENDIX B

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Attorney for Plaintiff, LARSSON FAMILY TRUST, by and through its personal representative, DOUGLAS LARSSON, as Trustee for the Larsson Family Trust

FILED
MADERA SUPERIOR COURT
JAN 13 2003
_____ CLERK
_____ DEPUTY

SUPERIOR COURT FOR THE
STATE OF CALIFORNIA
COUNTY OF MADERA

LARSSON FAMILY TRUST, by and through its personal representative, DOUGLAS LARSSON, as Trustee for the Larsson Family Trust,
Plaintiff,
v.
JIMMY L. GRABACH, DEAMA GRABACH, and DOES 1 through 10,
Defendants.

(Case No. CV04248)

PROPOSED JUDGMENT AFTER TRIAL

The above entitled action was tried without a jury on June 3 and 4, 2002 before the Honorable Charles A. Wieland, Judge of the Madera County Superior Court. The case was briefed and submitted. The court issued an Order after Trial, and based upon that,

IT IS ADJUDGED AND DECREED that Plaintiff shall be entitled to an Easement by Necessity as well as an Easement by Implication as follows:

THE LARSSON FAMILY TRUST owns that parcel of real property legally described as:

> The south half of the northeastern quarter and north half of southeast quarter of Section 7, Township 9 South, Range 20 East, M D B & M, according to the United States Government Township Plate.

This property has an Assessor's Parcel Number of 052-050-006-000 ("Dominant Estate.")

Jimmy L. Grabach and Deama Grabach are currently the owners in fee of the following parcel of real property legally described as:

> Lot 1, NE on fourth, of NW one fourth, of N of one half of NE one fourth of Section 7, Township 9 South, Range 20 East, M.D.B. & M, according to the United States Government Township Plate.

Otherwise known in this action as "Servient Estate."

The Dominant Estate shall be entitled to an easement commencing at the gate of the Grabach property at Road 400 (where the Larssons have typically gained access) and is to extend to the gate commonly used to gain access by the Larssons from the Grabach property and onto the Larsson property.

Further description and details concerning the easement are more fully set forth in the statement of decision and revisions to the statement of decision issued by the court. Said documents are incorporated by reference herein.

The court reserves jurisdiction to enforce the terms of this judgment.

Plaintiff shall be entitled to costs incurred upon the filing of a costs bill.

DATED: JAN 11 2003

CHARLES A. WIELAND
CHARLES A. WIELAND
Judge of the Superior Court

Approved as to form..

David Linn,
Attorney for Defendants
JIMMY L. GRABACH
and DEAMA GRABACH

FILED
MADERA SUPERIOR COURT
OCT 28 2002
_____ CLERK
BECKY INGHAM DEPUTY

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF MADERA

LARSSON FAMILY TRUST, by and through its personal representative, DOUGLAS LARSSON, as Trustee for the Larsson Family Trust,
Plaintiff,

vs.

JIMMY L. GRABACH, DEAMA GRABACH, and DOES 1 through 10,
Defendants.

Case No. CV04248

STATEMENT OF DECISION

This matter was heard by the court sitting without a jury on June 3 and June 4, 2002. After a briefing schedule, the matter was submitted on July 8, 2002. The court rendered an order after trial dated July 12, 2002. Defendants, JIMMY L. GRABACH and DEMA [*sic*] GRABACH requested a Statement of Decision pursuant to California Code of Civil Procedure section 632. The court conducted a hearing regarding objections made by defendants. Plaintiff has submitted a subsequent statement of decision. Defendants have objected and requested another hearing.

The objections are overruled. There shall not be another hearing. This document is the court's Statement of Decision.

I.

INTRODUCTION

Both parties own real property in Madera County. Their property is located off Road 400 in the Raymond area of the county. The plaintiffs own approximately 160 acres immediately south of the 122 acres owned by the defendants. The legal description of the parcels is as follows:

The LARSSON FAMILY TRUST owns that parcel of real property legally described as:

> The south half of the northeastern quarter and north half of the southeast quarter of Section 7, Township 9 South, Range 20 East, M D B & M, according to the United States Government Township Plate.

This property has an Assessor's Parcel Number of 052-050-006-000 ("Dominant Estate").

Defendants are currently the owners in fee of the following parcel of real property legally described as:

> Lot 1, NE one fourth, of NW one fourth, of N of one half of NE one fourth of Section 7, Township 9 South, Range 20 East, M.D.B. & M., according to the United States Government Township Plate. ("Servient Estate")

All of the property described above was, at one time, owned by the family of the plaintiffs, according to testimony.

The plaintiffs, and numerous family members, have for generations crossed from Road 400 and its predecessor through what is now the defendants' property in order to access what is now the plaintiff' property.

II.

DISCUSSION OF THE LAW REGARDING RIGHTS IN THE LAND OF ANOTHER

An easement is an interest in the land of another, which entitles the owner of the easement to a limited use or enjoyment of the other's land. *Moylan v. Dykes* (1986) 181 Cal.App.3d 561, 568.

A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed. Civil Code §1104. Therefore, when an owner of two adjoining pieces of land sells one of them, or the owner of a piece of land sells a part of it, the purchaser takes the portion sold with all the benefits that appear at the time of the sale to belong to it, as between it and the property which the seller retains. Before the transfer, and while all the land is owned by the grantor, there is no true easement (right in the land of another) but, instead, a "quasi-easement" does exist. *Fristos v. Drapeau* (1950) 35 Cal.2d 5, 8.

Easements by implication may also result when, by a will, that testator leaves parts of land to different parties. *Cheda v. Bodkin* (1916) 173 Cal. 7, 15. A deed of trust may carry with it easements by implication so that the purchaser of the dominant tenement at the sale acquires them. *Hamburger & Sons v. Lemboeck* (1937) 20 Cal.App.2d 565, 568. When the servient tenement is sold under foreclosure, the purchasers at the sale take subject to the easements if they have actual or constructive notice of them.. *Hamburger, supra*, 20 Cal. App.2d at 570.

When a deed describes a lot with reference to a map, and the map shows streets and alleys, the grantee has an easement in the use of such passage ways, regardless of whether they have been dedicated to the public. *Danielson v. Sykes* (1910) 157 Cal. 686, 689. This is true even when the map is not recorded but the purchaser of the servient tenement knew of it. *Syers v. Dodd* (1932) 120 Cal.App. 444, 446.

An easement is not implied unless it is "obviously and permanently" used by the grantor. CC §1104. This means that there must be something upon the servient estate which is either visible or in the nature of a permanent artificial structure. *Swarzwald v. Cooley* (1940) 39 Cal.App.2d 306, 325.

Easements may be implied to encroach on the retained land. *Dickson v. Eastown Realty Co.* (1951) 105 Cal.App.2d 260. While easement issues usually arise upon a separation from common ownership of joining and contiguous parcels, an implied easement may also arise in a grant of non contiguous lands. *Piazza v. Schaefer* (1967) 255 Cal.App.2d 328, 333.

An easement may be implied when it is reasonably necessary for the beneficial enjoyment of the land. *Fischer v.*

Hendler (1942) 49 Cal.App.2d 319, 322. Such a necessity may not be found where alternative means of access are available at reasonable costs. *Leonard v. Haydon* (1980) 110 Cal.App.3d 263, 268, 270, 273.

An easement by implication may arise from representations by salesmen or in advertising matter. In *Bradley v. Frazier Park Playgrounds* (1952) 110 Cal.App.2d 436, 439, the prospective lot purchasers were told that ownership would carry a right to use existing lakes and the playground area. In *Day v. Robison* (1955) 131 Cal.App.2d 622, 624, a real estate broker showed a purchaser a map with a roadway assuring them that it would be available to them. And, in *Gagnon v. Adamson* (1953) 122 Cal.App.2d 253, 255, a real estate salesman told the purchasers that they would have use of a certain well-traveled road.

An easement is normally implied because of the prior existence of an obvious quasi-easement. *Owsley v. Hamner* (1951) 36 Cal.2d 710, 717.

Although Civil Code §1104 only refers to implied grants, California law also recognizes easements by implied reservation. The result is that a purchaser may take not only the obvious benefits, but the obvious burdens as well. *Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 133. This rule may be some what mitigated when attempted to be implied in favor of the grantor. In *Orr v. Kirk* (1950) 100 Cal.App.2d 678, the original grantors sold half of their land to defendants' predecessors. They retained the part then owned by plaintiff, who claimed the right to use a driveway located in part on defendant's land. The trial court found, on sufficient evidence, that each parcel had other means of ingress and egress, and that the original grantors did not, at the time of severance of the track, intend the easement.

An easement may exist because of necessity. A way of necessity is not based upon a previous obvious and permanent use by the grantor but arises by necessity when a grantor conveys land shut off from access to a road by the grantor's remaining land, or partly by his land and partly by that of a stranger, or as a result of a partition, either voluntary or by order of the court. *Reese v. Borghi* (1963) 216 Cal.App.2d 324, 330.

An easement of necessity may be asserted by remote grantees in the chain of title long after the easement was created by the original common grantor, despite the failure of a prior grantee to exercise the right; and the statute of limitations on quiet title actions does not apply. *Lichty v. Sickels* (1983) 149 Cal.App.3d 696, 700.

The right of way by necessity exists only in cases of strict necessity and not where the grantee has another method of access even though the latter is inconvenient. *Hewitt v. Meaney* (1986) 181 Cal.App.3d 361, 370. Reasonable necessity may be sufficient to create an easement by implication but not a way of necessity. *Pipkin v. Der Torosian* (1973) 35 Cal.App.3d 722, 730.

An easement by prescription may be acquired by adverse use for five years. The usual elements must be shown: open and notorious use, continuous and uninterrupted, hostile to the true owner, exclusive and under claim of right; and if any taxes are separately assessed against the easement, these must be paid. *LeDeit v. Ehlert* (1962) 205 Cal.App.2d 154, 163. (Roadway used for hunting for 35 years.)

There can be no prescriptive right unless the use is wrongful, and the property owner has a cause of action. Therefore, a prescriptive right cannot result from use of a way

of necessity; this arises by implied grant, and its use is by right and not adverse. *Moots v. Casten* (1949) 90 Cal.App.2d 734, 737. Prescription cannot be gained if the use if permissive. *Jones v. Tierney-Sinclair* (1945) 71 Cal.App.2d 366. However, while use of a road may originally be permissive, if it is used for different purposes that may not necessarily be permissive, a prescriptive easement may be established. *Redemeyer v. Carroll* (1937) 21 Cal.App.2d 217.

The extent of the easement by prescription is ordinarily limited to the actual user under which it is gained. *Sylva v. Cuck* (1966) 240 Cal.App.2d 127, 135. However, easements are property rights, and, where appurtenant to land, are transferable and descendible. Transfers may be expressed or by implication as where land is transferred and all appurtenant easements are deemed to go with the grant without express mention. *Shonafelt v. Busath* (1944) 66 Cal.App.2d 5, 14. An easement is appurtenant when it is attached to the land of the owner of the easement, and benefits him as the owner or possessor of that land. The land to which it is attached is called the dominant tenement, and the land which bears the burden, the land of another, which is used or enjoyed, is called the servient tenement. *Roth v. Cottrell* (1952) 112 Cal.App.2d 261, 623.

III.

FINDINGS OF FACT

The facts of this case are for the most part undisputed. The Grabachs own approximately 122 acres. Their parcel sits immediately to the north of 160 acres owned by the Larsson Family Trust. And immediately to the east of the Larsson property is 320 acres owned by the Twid/Lucas family. Each of these three parcels was originally owned by the Larsson

family as part of the Larsson homestead created in the 1880's according to the oral testimony of several witnesses. While relevant title documents were not introduced as evidence, nor was controverting evidence.

The 160 acres has continuously remained in the Larsson family. The Twid/Lucas family purchased their 320 acres in the early 1990's. The Grabachs purchased their 122 acres in October, 1998. However, that particular parcel had changed hands outside of the Larsson family a number of times since at least the early 1950's.

The only paved road in the area is county Road 400 which is west of each of these three parcels. There is also a fourth parcel, known as the Stern/Hurst parcel which also is contiguous and south of the Grabach property and west of the Larsson parcel. The Stern/Hurst parcel sits between Road 400 and the Larsson property.

There are several dirt "ranch roads" that lead to the Larsson property. The one in question cuts the Grabach property almost in half. It begins at Road 400, crosses the Grabach property, intersects the Larsson property just east of the point where the Larsson, Stern/Hurst, and Grabach properties intersect, and then moves across the Larsson property first, in a southerly direction, and then in an easterly direction towards the Twid/Lucas property. That road generally follows the path of the Coarsegold creek as it traverses the Grabach, Larsson, and Twid/Lucas properties to the north of the creek.

Its existence has been obvious and permanent for several generations. Its use has been obvious, regular, and necessary for several generations, too.

The road continues across the Twid/Lucas property and connects with Longhollow Road, a paved road, which is a privately owned road within the Yosemite Lakes Park planned unit development. The road continues until it reaches Highway 41. The evidence indicates that this road was an old "wagon road" connection of what are now Roads 400 and Hwy 41.

The evidence is in dispute as to whether travelers, such as the Larssons, who do not own property in Yosemite Lakes Park, are allowed to regularly traverse the private roads of Yosemite Lakes Park to access property not within Yosemite Lakes Park. Lindy Cumberland (Lucas) testified that when her family bought the 320 acres west of the Larsson property that they felt forced to buy a 2 acre lot within Yosemite Lakes Park in order to gain access to their 320 acres through Yosemite Lakes Park. These parcels in question lie directly to the west of Yosemite Lakes Park. That dispute is largely irrelevant because even if the Larssons are entitled to drive through Yosemite Lakes Park they must still be entitled to traverse the Twid/Lucas property in order to reach their 160 acres.

The road, or as it is sometimes referred to by the witnesses, the pathway, or the trail, as it exists on the Twid/Lucas property, and as it gets closer to the Larsson property, is not always accessible during the winter, and, even during good weather, is not accessible by automobile. It is at best accessible with the use of a truck or four wheel drive vehicle.

Another dirt road or path leads from Lilly Mountain to the north of the properties in question in a southeasterly direction across the eastern portion of the Grabach property into the Larsson property, intersecting with the previously described

road. That road appears to be in poor condition and, there is no evidence to suggest that the road was used significantly by anyone, or that the Grabachs have any intention of allowing the Larssons to use that road to access their property. In fact, the Grabachs stated an intention to preclude use of their land for ingress/egress by others. At best, the evidence suggests that a bootlegger lived in the area in the 1920's and used this road, as well as the other roads in question, to conduct his illicit business. This "road" does not exist for any practical purpose.

Another dirt road or path crosses the Stern/Hurst property from Road 400 and leads to the Larsson property from the west. However, that road leads to the portion of the Larsson property that is south of the Coarsegold Creek. The Larssons primarily use the portion of their property on the north side of the creek because that is where their cabins are located. The testimony is clear that Coarsegold Creek is impassible when water flows through it during the winter and spring portions of the year, and, even in times of good weather, it is difficult if not impossible for vehicles other than trucks and four wheel drive vehicles to traverse.

The evidence indicates that the main road in question (from Road 400 through the Grabach property into the Larsson property) was used regularly by a number of people who lived in the general area at issue for purposes of ingress and egress prior to the creation of Yosemite Lakes Park and the distribution of the Larsson Estate in the 1940's and the sale of some of those properties in the 1950's, and thereafter. While cattle ranchers in the area have been allowed to traverse the various properties to facilitate their ranching enterprises, the evidence is that the primary use of the road in the last sixty years has been by various and numerous members of the Larsson family to access the 160 acre Larsson property.

While the Larssons have on occasion accessed their property across the Stern/Hurst property, Mr. Hurst testified that such use was by permission only, and he no longer gives permission for the Larssons to cross his property.

The evidence also indicates that while the Larssons have accessed their property across the Twid/Lucas property since the filing of the instant litigation, they have done so only with the temporary, and express, permission of one of the three owners of the property, Lindy Lucas Cumberland. She testified that while she will give the Larssons permission as long as she lives on the property, her co-owners have expressed a desire to not allow the Larssons to cross their property. Furthermore, there was a hearsay suggestion during the trial that the Twid/Lucas family may be attempting to sell their 320 acres in the near future.

The evidence is undisputed that there are no recorded easements in favor of the Larssons against any of the properties in question. The testimony established that various members of the Larsson family have for at least seventy to eighty years regularly, and frequently crossed the now Grabach property in order to access the Larsson 160 acres. They did so if not weekly, every two weeks, or monthly. In fact, Albert Larsson, father of the three current beneficiaries of the Larsson Family Trust (Douglas, Gary & Dennis Larsson) lived there full time in the 1980's.

The Larsson's have had a cabin on their property for more than 60 years. All the property in question was owned by Nathaniel Logan, a member of the Larsson family, who died and through his intestate estate, distributed the parcels in 1942. The Larsson's brothers' aunt, Amanda Dolly Cassaurang, received the land from Nathaniel Logan. The parents of the three beneficiaries, Albert & Bertha Larsson,

were married in the cabin on the property in 1943. That cabin became known as the honeymoon cabin. Albert acquired the 160 acres in 1970, and built a new cabin on the property. The road in question was used to haul materials across the now Grabach property for the construction of that cabin.

Each of the Larsson brothers testified that they have always used the road across what is now the Grabach property because he believed he had a right to do so. That road is about 8 feet wide at its narrowest point. There is a gate on the Road 400 access to the Grabach property. The Larssons have always had their own lock on that gate. There is another gate at the other end of the road as it enters the Larsson property which may or may not have had a lock on it for a significant period of time. However, Albert Larsson apparently erected a sign with the family name above the gate leading into the Larsson property that, until the Grabach's purchased the northerly 122 acres, had been up for a substantial period of time.

Eastern Madera County Realtor Brad Ditton listed what became the Grabach property for sale on behalf of the company that then owned it. The Grabachs enlisted the aid of Pinetree Realty Broker Sherry Reames. Mrs. Reames had several discussions with Mr. Grabach. Four or five of those discussions included the topic of easements and/or the "pathway" across the property to the Larsson property. Mr. Grabach made it clear that he wanted no recorded easement on the property. That statement was even reflected in writing as part of a real estate offer to purchase the property. She and he discussed the nature of an unrecorded easement, the difficulty of determining whether unrecorded easements existed, and even that the road could have been used by the Larssons because it lead to the Larsson property.

Mrs. Reames did not speak with the Larssons about their use of the road. She did, however, discuss the Larsson use of the road with Realtor Ditton. The information she received from Mr. Ditton was provided to Mr. Grabach by way of a facsimile transmission. That portion of the facsimile transmission as it relates to the Larsson property states as follows:

> "Brad Ditton called me this morning to let me know that he had been in contact with Mr. Larsson. According to Mr. Larsson, his grandfather had originally owned a large amount of the property in that area. All that remains is the piece next to the 122 acres. Mr. Larsson does not live there but does use the property as a "mountain cabin" time to time. He does, by the way, have dogs on automatic feeders and water, on the property all the time.
>
> Mr. Larsson seemed very low key about the access, commenting that he went that way because that was the way they had gone when his grandfather owned the land. It is clear, however, that his grandfather never granted an easement to himself or the property at the time of sale. Also, Mr. Larsson has indicated that there has never been verbal agreement as to access, either. Mr. Larsson also, indicated that he does have an easement, or at least a way out, over the Stern property.

> He is not opposed to selling the property north of the creek but he became confused during the conversation as to just what is north of the creek. Brad is faxing maps to him before that conversation can go any further."

Mr. Ditton testified that he did give the information to Mrs. Reames as is reflected in her facsimile transmission to Mr. Grabach. He said that he contacted Mr. Larsson in order to disclose everything that he, as a realtor needed to disclose to Mr. Grabach, as a potential buyer. He believed that he discussed with Larsson the access across the Stern property and the inability to use that property because the road was not totally useable and access was only to a small portion of the Larsson property. The primary access issue was across what became the Grabach property. Mr. Ditton testified that Mr. Larsson said that he believed, and his family believed, that they had a right to use the road across what became the Grabach property from at least the 1930's through their grandfather.

Mrs. Reames then, the day after she sent the facsimile transmission to Mr. Grabach, again spoke with Mr. Ditton, who relayed the information that he had again spoken with Mr. Larsson, to be informed by Mr. Larsson that the Larssons did not have an easement over the Hurst property. That information was relayed by Mrs. Reames to Mr. Grabach prior to the close of escrow on the Grabach property.

Mrs. Reames not only discussed the issue of prescriptive easements with Mr. Grabach but she gave him a copy of an article from a realtor magazine discussing non recorded easements and how one might use the land of another to get from one piece of property to another piece of property. In

the end, and prior to close of escrow, Mr. Grabach told Mrs. Reames that he would take care of the unrecorded easement issues. In her mind, she believed that she had been relieved of any responsibility as to that issue.

Mr. Grabach testified in a manner similar to that of Mrs. Reames and Mr. Ditton, at least as to their recollections of conversations with him. Mr. Grabach was unsure as to whether he knew at the time escrow closed that there were one or more dogs on the Larsson property. He also testified that he knew that his title insurance policy excluded unrecorded easements. While he testified that he did not tell anyone that he would lock out anyone who tried to use the property after he purchased the property, he did, after purchasing the property, lockout the Larssons. Within a month of the purchase of the property, or on Thanksgiving Day, he spoke to two of the Larssons and made it clear that they would not be allowed to cross his property to get to theirs. He has not allowed access to the Larsson property across his property since that time.

The Larssons sued him about a year later.

IV.

LEGAL CONCLUSIONS

Plaintiffs have established an easement by necessity. Public policy favors the use and development of land. Therefore, the law recognizes an implied easement or way of necessity to landlocked parcels.

The parcels in question here did have common ownership at one time. No easement was expressly conveyed through subsequent transfers. However, the law presumes, dependent

on supporting facts, that a grantor implicitly conveys or reserves whatever is necessary to put the property to beneficial use. That includes an easement.

The Larsson's property is landlocked. The Grabach's property has been used to access the Larsson's property for generations. There is no other means of access. The alleged road from Lilly Mountain does not exist for practical purposes. The road across the Stern/Hurst property has been closed to the Larssons. The threat of litigation regarding that road does not change the denial of permissive access to the Larssons by Mr. Hurst. Furthermore, that road does not provide access to the Larsson's cabin when water runs in the creek bed. The water barrier denies access to the property for its intended use from the west. And the road across the Twid/Lucas property is available only through the tenuous permission of Ms. Lucas. Since that permission may be denied at any time, and is most likely to be denied in the future, the Larssons will have no access to their property but through their historical route, the Grabach property. However, even with permissive use, the Larssons are denied the use of the property that they previously enjoyed because of the physical, geographical barrier on the Twid/Lucas property.

There is no conflict in the evidence as to Nathanial Logan's ownership of the Larsson and Grabach parcels. Nor is there any conflict regarding the fact that regardless of who signed what deeds in 1942, those deeds were signed to administer the estate of Nathanial Logan, the common owner of the properties in dispute.

The same evidence establishes a clear intent to transform what was a quasi-easement into a reserved, or implied, easement. While the use of the road in question may have been for purposes of going from the east to the west of

the properties, or vice versa, rather than focused on the use of specific parcels for specific reasons, that changed by at least 1943 when the cabin became known as the honeymoon cabin. It is unclear when the cabin was constructed. It is without a doubt, however, that the use of the Larsson's property focused on the use of that cabin, and then the new cabin, thereafter. It is also clear that the Grabach parcel was regularly and frequently used for ingress and egress by the Larssons and others prior to Nathaniel Logan's death, and since at least the 1930's.

The plaintiffs have established an easement by implication.

The plaintiffs have not established and easement by prescription. Their own testimony does not indicate a hostile and adverse use of the property. In fact, in indicates permissive use, or an acquiescence in the implied right to use the property as their family had done for years.

V.

SPECIFIC ISSUES REQUESTED TO BE ADDRESSED BY DEFENDANT

Issue No. 1

Was an easement by strict necessity created by the plaintiffs or their predecessors-in-interest?

Yes, see discussion in pages 6 through 13, herein.

Issue No. 2

Was an easement by implication created by plaintiffs or their predecessors-in-interest?

Yes, see discussion in pages 6 through 13, herein.

Issue No. 3

What document or documents created an easement by implication?

The question assumes that an easement by implication may only be created by document. As the discussion of law herein indicates, that is not necessarily so. However, some documents were helpful in determining the issue. Those documents were Exhibit 5a, the decree settling a first account for the distribution of the estate of Nathaniel Logan; as well as Exhibit 5b which was a Deed executed by Albertina Julien aka Albertina E. Julien, Harrison A. Larsson aka Harry A. Larsson, and Amanda L. Cassaurang to John Franklin Logan, recorded December 5, 1992, in Book 315, Page 433 of Official Records; as well as Exhibit 6c, a Deed executed by Albertina Julian aka Albertina E. Julien, Harrison A. Larsson aka Harry A. Larsson, and John Franklin Logan to Amanda L. Cassaurang, Recorded December 5, 1944, in Book 315, Page 432 of Official Records.

Issue No. 4

Who were the parties to the creation of the easement by implication?

The question, in focusing on "parties," assumes too much. While "parties," in legal jargon, typically do create legal relationships, intentionally, it is also true that other persons and circumstances contribute to the creation of an easement, as discussed herein at pages 4 and 5.

The easement by implication was recognized when Judge Murray on December 5, 1942 ordered the property of Nathaniel Logan to be divided. As such, the party who confirmed the easement by implication was the Estate of Nathaniel Logan. Additionally, see the factual discussion

pages 6 through 13 herein. An easement had been implied or reserved by the conduct of Mr. Logan prior to his death.

Issue No. 5

Do the plaintiffs have an easement by necessity across the Lucas/Twid property and Longhollow drive until it reaches Highway 41?

The court has ruled that there is no necessity for this question to be answered. The owners of those properties are not litigants herein.

Issue No. 6

Do the plaintiffs have an easement by implication across the Lucas/Twid property and Longhollow drive until it reaches Highway 41?

The court has ruled that there is no necessity for this question to be answered. The owners of those properties are not litigants herein.

Issue No. 7

Who were the plaintiffs' predecessors in interest who used the alleged easement across the Grabach parcel prior to 1942?

The testimony of Lewis W. Shannon is clear that there were many houses, whose owners/users that gained access over the Grabach property parcel and that Nathaniel Logan had used the road to gain access to the back portion of his property. The evidence also indicates that Albert and Bertha Larsson, as well as unnamed members of the family, used it.

Issue No. 8

Who used the easement?

See discussion in pages 6 through 13 herein.

Issue No. 9

Where was the easement?

In terms of the location of the easement, the Court finds that the easement is that approximately eight foot wide dirt road, the only such road, that starts at the gate at the Grabach parcel at the gate's location at Road 400 and ends at the gate between the Larsson Parcel and the Grabach parcel.

Issue No. 10

How wide was the easement?

See number 9 above.

Issue No. 11

Can the plaintiffs claim an implied easement while simultaneously claiming an easement by prescription across either the Lucas/Twid property or the Hurst property?

The court ruled that this is a question that need not be answered in this Statement of Decision. A party may "claim" anything, especially as to non parties.

Issue No. 12

For what reasons has the Grabach property been used to access the Larsson property?

The Grabach property has been used to gain access to the Larsson property to run cattle, for recreational uses, and to

gain access to cabins/residences that are located on the Larsson property.

Issue No. 13

Are there no other means of access to the Larsson property?

No. See discussion in pages 6 through 13, herein.

Issue No. 14

What is the difference between the Twid/Lucas possible denial of permissive access, the Hurst denial of permissive access, and the Grabach attempted denial of permissive access?

The court has indicated that no response needs to be provided to this question.

Issue No. 15

When was what is referred to as the honeymoon cabin built?

The testimony of Doug Larsson, as well as Bud Shannon establish that the honeymoon cabin was placed on the Larsson property after Amanda Cassaurang became the owner of the property.

Issue No. 16

What was the intended use of what described in the lawsuit as the Larsson parcel?

The intended use was to allow reasonable use of the property for purposes of ingress/egress, grazing, and use similar to that or surrounding parcels, including living.

Issue No. 17

If a written deed "trumps" oral testimony, what effect did the two deeds introduced into evidence signed by the Larssons' predecessor in interest in 1942 have on the alleged easement?

The conveyance was completed when the decree settling first and final account and for Distribution was entered by Judge Murray on December 5, 1942, (Exhibit 5a). The conveyance was effective on execution of the Order.

The two deeds did not have any contrary legal effect, as the property was already transferred by the decree entered by Judge Murray. The two deeds simply evidenced what had already been done when Judge Murray entered the order of distribution.

Issue No. 18

When was the Grabach parcel regularly and frequently used for ingress and egress to the Larsson parcel?

The evidence was that the Grabach parcel was regularly and frequently used for ingress and egress to the Larsson parcel, as well as many other properties behind the Larsson parcel.

After the property was divided in 1942, the Grabach parcel was regularly and frequently used for ingress and egress to the Larsson parcel. This use was from the time Amanda Cassaurang was the owner up to the time the Defendant locked the Plaintiff out of the property. This is according to the testimony from Bud Shannon, Doug Larsson, Gary Larsson and Dennis Larsson. See discussion in pages 6 through 13, herein.

Issue No. 19

What effect did the alleged fact that the Grabachs may have had knowledge of the Larssons' easement claims to the 122 acre parcel have on the decision that the Larssons were entitled to the implied easement?

This question does not require a response.

VI.

MISCELLANEOUS

This statement merely explains the ultimate factual and legal basis for the decision regarding the principal controverted issues. In so doing, it recites in narrative form the pertinent substantive and procedural events without attempting to repeat those conclusions in addressing the concerns of either side. Not all issues raised require determination. And the court does not intend to attempt to resolve legal issues involving the parties' neighbors who were not litigants in this matter.

Lastly, Mr. Grabach, on two occasions, has submitted written ex parte communications to the court regarding this matter. I have not read or considered them. I hope his attorney will advise him not to do this again.

Dated: October 28, 2002

/s/ CHARLES A. WIELAND
CHARLES A. WIELAND
Judge of the Superior Court

APPENDIX C

Court of Appeal
Fifth Appellate District
No. F042675
S128237

SUPREME COURT
FILED
DEC 15 2004
Frederick K. Ohlrich Clerk

Deputy

IN THE
SUPREME COURT OF CALIFORNIA

En Bank

LARSSON FAMILY TRUST et al.,

Plaintiffs and Respondents,
v.
JIMMY L. GRABACH et al.,

Defendants and Appellants

Petition for review DENIED.

Baxter, J., was recused and did not participate.

/s/ George
Chief Justice